BSN COMMERCIAL BANK (MALAYSIA) BHD

v.

FAWANIS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: S6(S2)-24-2197-2000]
1 AUGUST 2002

LAND LAW: *Charge - Order for sale - Opposition from chargor/surety - Cause to the contrary, whether shown - Variation in interest rate of loan facility by chargee/bank - Whether notice of variation given to borrower - Whether notice of variation served on chargor - Whether failure to serve notice on chargor fatal - Whether increase in interest rate right and proper - Judgment not obtained against borrower - Whether right for chargee to proceed solely against chargor - National Land Code 1965, s. 256*

BANKING: *Securities for advances - Charge over land - Charge to secure overdraft facilities - Order for sale - Opposition from chargor/surety - Cause to the contrary, whether shown - Variation in interest rate of loan facility by chargee/bank - Whether notice of variation given to borrower - Whether notice of variation served on chargor - Whether failure to serve notice on chargor fatal - Whether increase in interest rate right and proper - Judgment not obtained against borrower - Whether right for chargee to proceed solely against chargor - National Land Code 1965, s. 256*

This was an application by the plaintiff/bank, under s. 256 of the National Land Code 1965, for an order for sale in respect of a piece of property charged to it by the defendant/chargor as security for an overdraft facility of RM50 million given to a borrower. The application was opposed by the defendant on the ground that there was 'cause to the contrary', namely, that: (i) the sum demanded by the plaintiff was invalid because the interest rate imposed was excessive and unlawful; (ii) the defendant did not receive any notice in respect of a change in the interest rate; and (iii) judgment had not been obtained against the borrower.

Held:

[1] Pursuant to the loan agreement, the plaintiff had every right to vary the interest rate in respect of the overdraft facility. In addition, the plaintiff had also complied with the contractual requirement of giving notice of the variation to the borrower. (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 SC followed.) (pp 24 g-h & 25 a-b)

[2] The issue of whether notice had been served on the defendant, in respect of the variation in the interest rate of the overdraft facility, was **not** one that was 'serious', so long as the variation or increase in the interest rate was not imposed improperly. The interest rate herein, as increased by the plaintiff, was not improper. (*Moscow Narodny Bank Ltd v. New Kok Ann Realty Sdn Bhd* [1989] 2 CLJ 851 HC followed.) (pp 25 h & 26 c)

[3] The fact that judgment had not been obtained as against the borrower was inconsequential. It was well within the rights and remedies of the plaintiff as chargee/creditor to proceed against the defendant as chargor/surety. (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 SC followed.) (p 26 d-g)

[Plaintiff's application allowed; sale ordered.]

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Moscow Narodny Bank Ltd v. New Kok Ann Realty Bhd [1989] 2 CLJ 851; [1989] 2 CLJ (Rep) 139 ***(foll)***

Legislation referred to:
National Land Code, s. 256

For the plaintiff - KA Gan (Rizal Johar); M/s Lee Hishammuddin
For the defendant - Teh Meng Teck (Jayne Koe); M/s Cheah Teh & Su

Reported by Gan Peng Chiang

JUDGMENT

Azmel Maamor J:
The plaintiff in this case applied, in accordance with s. 256 of the National Land Code 1965, for an order of sale of property held under H.S.(D) 64305 P.T. 392 Section 90 Bandar Kuala Lumpur Wilayah Persekutuan which was charged by the defendant in favour of the plaintiff. The defendant, the registered owner of the said property, opposed the plaintiff's application.

The brief facts of the case are as follows. On terms and conditions of a letter of offer dated 29 December 1995 and also a loan agreement dated 4 January 1996 the plaintiff granted to a company, Uniphoenix Corporation Bhd. (Borrower) an overdraft facility amounting to RM50,000,000. In conformity with the requirements of the terms and conditions of the said letter of offer and the loan agreement the defendant had agreed to charge its property as stated above in favour of the plaintiff. It is a term of the charge that in the event the borrower commits a breach of the terms and conditions of the said

agreements, the defendant would also become indebted to the plaintiff. Subsequently the borrower did commit a breach of the said agreements thereby rendering the defendant to be indebted to the plaintiff. As such the plaintiff issued demand letters to the borrower and the defendant for the sum due and owing. But both the borrower and the defendant failed to pay the sum due and owing to the plaintiff. On 18 September 1998 a settlement agreement was executed between the plaintiff and the defendant wherein payments of the said facility were governed by the terms and conditions of the said settlement agreement. However defendant failed to make payments in accordance with the terms and conditions of the settlement agreement. Only a few installment payments were made by the defendant. As such the plaintiff terminated the settlement agreement. By a letter dated 12 July 2000 the plaintiff demanded from the borrower and the defendant for the sum due and owing to the plaintiff amounting to RM46,650,267.44. The plaintiff had also issued a notice under Form 16D pursuant to s. 254 of the National Land Code to the defendant but the defendant failed to correct the breach committed under the charge. The amount outstanding as of 16 August 2001, being the date of my decision, was RM51,793,044.73.

In its affidavit in reply the defendant gave three main grounds in opposing the plaintiff's application. They are as follows:

1. The sum demanded by the Plaintiff was invalid, ineffective and void because the interest rate demanded by the Plaintiff was excessive and unlawful;

2. The Defendant did not receive the notice regarding the change of interest rate dated 24.1.1998 or any notices that the interest rate for the said financial facility had been changed; and

3. Judgment had not been obtained against the Borrower.

In respect of the 1st ground, ie, in respect of the right of the plaintiff to change the rate of interest, it was argued by the plaintiff that it has the right to vary the interest rates subject to issuing notice to the borrower. The plaintiff contended that it had issued such notice to the borrower *vide* letter dated 24 January 1998 in which the borrower was informed of the variation of the rate of interest imposed to 3% per annum on the base landing rate on daily rest.

In my view the plaintiff had the right to vary the interest rate in respect of the said financial facility given to the borrower and the plaintiff had also complied with the required condition in that the borrower had been notified of the change in the interest rate. With the defendant having signed the settlement agreement of 18 September 1998 in which the defendant had agreed

to be liable to the plaintiff to pay the principal amount together with the interest thereon, charges and all other monies that is due to the plaintiff, it is therefore not plausible for the defendant to argue that it is not liable to the plaintiff on the ground that the plaintiff had no right to vary the interest rate of the said financial facility. In support of this ruling I need only to quote the Federal Court decision in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36:

> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of the contract, eg, by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate the role assigned to them by Parliament.

In the light of the above reason the defendant's 1st ground cannot be regarded to have constituted cause to the contrary.

I shall now deal with the defendant's 2nd ground ie, on the allegation of non-receipt of the notices of the change of the interest rate of the financial facility. The plaintiff contended that by a letter dated 24 January 1998 it had informed the borrower of the changes in the interest rate from 3% per annum imposed on the base landing rate on daily rest. (Exh. A8 in encl. 10). Subsequently the interest rate was reduced to 2.5% per annum on base landing rate on the daily rest pursuant to the guidelines issued by Bank Negara dated 15 September 1998. (Exh. A9 in encl. 10). However the defendant alleged that the plaintiff had not issued such notice to them.

On this issue of service of notice, it would appear that the courts do not consider it to be of serious condition, as long as the rate of interest has not been improperly imposed. Such is the principle adopted in the case of *Moscow Narodny Bank Ltd. v. New Kok Ann Realty Bhd.* [1989] 2 CLJ 851; [1989] 2 CLJ (Rep) 139 where YA LC Vohrah J said:

> There was no evidence that any interest had been improperly imposed by the Plaintiff, and when the notice of demand was given, Mosbert was already in liquidation. As such, no purpose would have been served if a notice changing the rate of interest had been sent to either Mosbert or the Defendant. In any event, the provision of the charge providing that a statement of an officer of the Plaintiff as the amount of the balance owing would be final and conclusive would apply in the absence of fraud.

Based on the circumstances of this case, I decided to adopt the principle in the abovesaid case. I found the rate of interest increased by the plaintiff was not improper. It was reduced immediately after the guideline was issued by Bank Negara. Furthermore, in encl. 27 the plaintiff had solemnly and sincerely averred that the borrower or the defendant had received the notice of the outstanding amount owing from the borrower and the defendant (see exb. SB1). The amount outstanding as stated in the plaintiff's letter would be regarded as final and conclusive since there was no allegation of fraud raised by the defendant.

The final ground raised by the defendant was that judgment had not been obtained against the borrower. On this issue I only need to refer again to the principle adopted by the Federal Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd. (supra)* which states:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover moneys lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, comtemporaneously or successively.

In the light of the clear principle as stated above there was no merit whatsoever in the final ground raised by the defendant. There were some other minor issues raised by the defendant but I was of the view that they did not merit consideration.

After having considered all the circumstances of the case, I arrived at the conclusion that the defendant had failed to establish any ground that would constitute cause to the contrary. As such I allowed the plaintiff's application for an order of sale of the said property together with costs.